

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

95316

58573

FILE: B-181165

DATE: February 24, 1975

MATTER OF: Technology, Inc.

DIGEST:

1. Considering statements advanced by protester and procuring agency concerning contention that agency directed protester to raise proposed wage rates during negotiations to protester's competitive disadvantage, it is concluded that agency's view of negotiations--that its comments were in the nature of concern only over lowness of wage rates proposed--is more reasonably consistent with described events than protester's version.
2. Prudent offeror in negotiated procurement should have realized that, in accordance with RFP direction for offerors to submit proposals on most favorable terms from technical and cost considerations, price, especially with regard to fixed-price award ultimately selected, would still have significant importance in selecting proposed contractor, notwithstanding prior agency expressions of concern about lowness of wage rates proposed by offeror for cost-type award contemplated earlier in procurement.
3. Since phrase "similar or related" as used in "Qualifications" evaluation standard of RFP permits rational interpretation that phrase means similar experience from "functional or operational" viewpoint as well as similar experience from purely "content" viewpoint, "Qualifications" rating given successful offeror, which lacked similar "content" experience but possessed similar "functional" experience, cannot be questioned.
4. Complaint questioning affirmative responsibility determination because of contractor's alleged lack of financial resources cannot be considered in view of policy not to review affirmative responsibility determinations absent allegation of fraud or bad faith.

5. Complaint (filed May 1, 1974) relating to solicitation defects is untimely under protest procedures because not filed prior to final closing date for negotiated procurement on April 17, 1974; complaint relating to alleged improper negotiation procedures is untimely filed since not made within 5 days from date basis of complaint was known. Consequently, complaints are not for consideration. See 4 C.F.R. § 20.2(a) (1974).

This protest questions the rationale supporting the award of a negotiated, fixed-price contract. For the reasons set forth, it is our view that the award is not subject to question.

On February 19, 1974, request for proposals (RFP) No. 641-4-2041 was issued by the National Center for Toxicological Research (Center) of the Department of Health, Education, and Welfare (HEW), for diet preparation services for laboratory animals. A cost-plus-fixed-fee (CPFF) contract was anticipated for the work, but the RFP also advised that consideration would be given to other contract types if proposed.

Evaluation criteria for the RFP were, as pertinent:

	<u>Weight</u>
"(a) Plan for accomplishing the work * * *	40
(b) Qualifications of the offeror and key personnel.	30
<u>Offeror</u> - Special notation should be made of similar or related programs performed for the Government * * *	10
<u>Personnel</u> - Information is required which will show the composition of the work group, its general qualifications, and recent experience with similar projects * * *	20
(c) Understanding the scope of the work * * *	30"

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The only information in the RFP about the importance of cost as an evaluation factor was as follows:

"* * * it is important that * * * proposal[s] be submitted initially on the most favorable terms from * * * technical and cost standpoints." (Paragraph A (7) of the RFP's General Instructions)

On March 21, 1974, three proposals for the work were received from Program Resources, Inc. (PRI), Technology, Inc., and the University of Arkansas.

Initial proposals were then scored. The scores as of March 26, 1974, were:

Technology	- 74.25
PRI	- 73.50
University of Arkansas	- 62.50

Cost analysis was also made of the received proposals. PRI's CPFF proposal was considered to have a number of proposed costs which needed to be reduced. The company also proposed a fixed-priced proposal.

The Center's cost analyst did not take exception to any cost element in Technology's CPFF proposal, although the analyst was concerned about the salaries proposed for technicians and whether Technology could retain personnel with the proposed salaries.

Prior to commencing negotiations with PRI and Technology, the Center outlined the areas to be covered in negotiations as follows:

"I. PRI

(a) Type of contract in order of preference:

- (i) Firm Fixed Price
- (ii) Fixed Price, Indefinite Quantity
- (iii) Cost Sharing (with fee)
- (iv) Cost-Plus-Fixed-Fee

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(c) reduction in price/cost * * *

* * * * *

"II. Technology

(a) Type of Contract, in order of preference:
(there followed the listing of types as set forth
for PRI)

* * * * *

(c) Adjustment in price based on the cost analyst's
comment about low salaries for technicians * * *

The Center reports that negotiations were then held with each offeror during the week prior to April 5, 1974. Each offeror made a verbal presentation of its proposal.

All three offerors were requested to submit "best and final" proposals by April 5, 1974. Final proposals received on April 5 were then scored with the following results:

PRI	- 84.4
Technology	- 81.4
(University of Arkansas did not respond)	

The narrative accompanying the final scores shows that PRI rated the highest score because it "understood the scope of work only slightly better than Technology, Inc." and its proposed project director appeared to be better qualified than Technology's project director. PRI and Technology received identical scores under the "Qualifications" evaluation standard of the RFP. PRI received such a score, as later explained by the Center, because the company "demonstrated [its] ability to perform on an operations-type contract as they are presently operating the NCTR [computer facility] data center under contract"--although the company had "no direct experience in diet preparation."

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By contrast, Technology, although possessing a sound understanding of the scope of the work, did not appear "to have in-depth knowledge as did PRI." Technology's strong points related to its experience on programs involving experiments using laboratory animals and the company's interest in establishing and implementing a sound quality control program.

Notwithstanding the submission of "best and final" proposals as of April 5, negotiations with Technology and PRI were subsequently continued. Both offerors were informed, among other things, of the Government's objective to negotiate a fixed-price or cost-sharing contract rather than the cost-plus-fixed-fee type. Discussion with Technology also covered "salaries proposed for technicians which appear[ed] to be quite low."

All parties eventually agreed on a fixed-price, indefinite quantity contract which would be based on the Government estimate of the number of animal feeder boxes (489,534) to be filled. A revised date (April 17, 1974) was set for the submission of final offers based on this contract type. The Center states that prior to the submission of final proposals, both offerors were told that "price could be the deciding factor (in selecting the successful offeror)."

Best and final offers were submitted by both concerns on April 17. On April 22, 1974, a contract for the services was awarded to PRI, since its technical proposal was considered "superior to that submitted by Technology" and its price was the lowest received.

Technology complains that the Center, by questioning the company's proposed salaries during negotiations, directed Technology to raise its final fixed-price offer to such a degree that PRI, rather than Technology, submitted the lowest-priced offer.

Technology further contends that it should have been told to "consider raising its rates--'but at its own risk' since, as it turn[ed] out, this was a highly-competitive procurement."

The Center rejects the suggestion that it directed PRI to raise its labor rates. It insists that it expressed legitimate concern only over the rates, and it contends that Technology: (1) downgraded the effect of increasing its labor rates during negotiations by stating: "[t]hese increased [labor] costs have been offset to a great degree with a reduction in the number of man-months originally proposed"; and (2) emphasized the desirability of the increases during negotiations by stating: "In order to provide the best possible assurance of maintaining a project staff with a low factor of attrition we have * * * made [labor wage rate] adjustments that we think will be necessary." Further, the Center asserts that once a fixed-price contract type was agreed to, "no other discussion was held concerning labor rates* * *."

Considering the statements advanced by both sides, we are inclined to agree that the view proposed by the Center--that its comments to Technology were in the nature of expressions of legitimate concern over the wage rates proposed by Technology--is more reasonably consistent with the described events than that advanced by Technology. Further, we think a prudent offeror should have realized that, in accordance with the RFP direction for offerors to submit proposals on the "most favorable terms" from "technical and cost" considerations, price, especially with regard to a fixed-price award of the type finally decided on here, would still have significant importance in selecting the proposed contractor, notwithstanding prior agency expressions of concern about the lowness of wage rates proposed for the cost-type award earlier contemplated.

Issue is also taken with the way in which the Center evaluated PRI's resources under the "Qualifications" criterion of the RFP. Specifically, Technology contends that PRI should not have received a score equal to Technology's score under that criterion because of PRI's lack of experience in "similar or related" programs involving experiments with laboratory animals.

HEW has furnished us with a supplemental report which compares the work requirements involved in PRI's operation of the computer facility at the Center to the services which are being required under the subject contract. HEW states that the

comparison "highlight[s] the functional requirements for completing the diet preparation contract and show[s], where similarity exists, how performance of the data systems contract [by PRI] constitutes 'experience in similar or related programs.'"

Technology does not take specific exception to HEW's latest analysis. Consequently, and since we think the phrase "similar or related" permits a rational interpretation that the phrase means similar experience from a functional or operational viewpoint (that is: prior similar experience on a large scale "operations" type contract (specifically, data processing)) in addition to meaning similar experience from a purely "content" viewpoint (that is: prior similar experience with experiments on laboratory animals), we cannot question the score given to PRI in the "Qualifications" area for its demonstrated experience under a functionally similar program.

By letter of today to the Secretary of HEW, however, we are recommending that this phrase, when used in future solicitations, be defined as precisely as possible.

OTHER GROUNDS OF PROTEST

Other grounds of protest are: (1) PRI lacks the financial resources needed to be considered a responsible prospective contractor; (2) the RFP statement referencing a work facility was unclear; (3) the RFP was not properly amended to make clear the proposed final contract type (fixed-price); and (4) certain negotiation procedures followed prior to the final closing date (April 17, 1974) were improper.

ANALYSIS OF ADDITIONAL GROUNDS OF PROTEST

I. In recognition of the announced GAO position not to review protests which question affirmative responsibility decisions in the absence of an allegation of fraud or bad faith, (See, for example, Matter of United Hatters, 53 Comp. Gen. 931 (1974), ground of protest (1) cannot be considered.

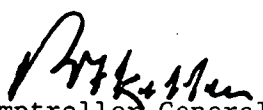
II. (Protest grounds 2 and 3)--these grounds of protest relate to solicitation defects. Since the defects were not protested

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prior to the final closing date for receipt of proposals on April 17, 1974, this part of the protest is untimely under 4 C.F.R. § 20.2(a) (1974) and will not be considered.

III. (Protest ground 4)--this ground relates to negotiation procedures which the protester was aware of no later than April 17, 1974, the date established for receipt of best and final offers. The company's protest was received at GAO on May 1, 1974, or more than 5 working days after the basis of protest was known on April 17. Consequently, this aspect of the protest is untimely. See 4 C.F.R. § 20.2(a).

Consequently, the protest is denied.


Deputy Comptroller General
of the United States